Supreme Court, U.S.
FILED
JUL 7 2003
CLERK

No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit**

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

20pp

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BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus National Education Association ("NEA") is a nationwide employee organization with some 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States.[1] As articulated in its mission statement, one of NEA's primary purposes is to "expand the rights and further

[1] This brief *amicus curiae* is submitted with the consent of the parties, whose letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

the interest of educational employees." Working through a network of affiliated organizations at the state and local levels, NEA attempts to do this by representing education employees in dealing with their employers in regard to salaries, benefits, and other terms and conditions of employment. In most jurisdictions, this representation takes place through collective bargaining.

Collective bargaining agreements that are negotiated by NEA affiliates routinely contain provisions that determine eligibility for, or the terms of, retirement, health insurance, severance pay, and other benefits on the basis of whether the employee has attained some minimum age. The decision of the court below calls into question the legality of many such provisions and, if allowed to stand, would seriously impair the ability of NEA affiliates and the employers with which they deal to take into account the particular needs of older employees in allocating scarce resources through the collective bargaining process.

NEA submits this brief *amicus curiae* to protect the integrity of its affiliates' collective bargaining agreements against an interpretation of the Age Discrimination in Employment Act that could not have been within the contemplation of Congress.

SUMMARY OF ARGUMENT

1. Provisions that condition eligibility for a benefit on the attainment of a minimum age, or vary the terms of the benefit with increasing age, are routine features of employee benefit programs negotiated as part of collective bargaining agreements between employers and unions. Many of these exceedingly common employee benefit programs would not survive under the analysis of the court below. Rather than stemming from age-based animus or stereotypes, such differential allocation of benefits, in the areas of pensions,

health care, severance pay, and the like, reflects the parties' attempt to target scarce resources to those employees who need them most.

2. Because the experience of old age is one that (barring misfortune) is experienced by all, and because of the objectively greater needs and costs that come with advancing age, age is different from other anti-discrimination classifications—in ways that are directly relevant to employee benefits provided in connection with or in anticipation of old age. For this reason, principles derived from the context of race or gender discrimination cannot be applied without further analysis in the context of age discrimination. Indeed, both law and society recognize the particular needs of older employees and the legitimacy of differential treatment based on advanced age.

3. In enacting the ADEA, Congress understood the unique nature of age, and did not prohibit the preferential allocation of employee benefits to older employees that is at issue here. The ADEA's repeated emphasis on the problems and needs of "older" workers—as well as a specific statutory provision that addresses the differential provision of benefits to older and younger workers—are inexplicable if Congress' intent was to prohibit employers from treating older employees more generously than their younger peers with respect to the provision of benefits that allow employees to deal with the consequences of old age. Far from being faithful to the intent of Congress, the ultra-literal reading of the statute adopted by the court below merely confirms the limitations of literalism as a method of statutory interpretation.

ARGUMENT

It is the premise of this brief that age is fundamentally different from other characteristics on which our nation's anti-discrimination laws are based—such as race, gender, or religion—and that because of this difference it is entirely

reasonable for unions and employers, in collective bargaining, to adopt employee benefit packages that in certain respects may treat older workers more generously than their younger peers. The Age Discrimination in Employment Act ("ADEA")—which was enacted "to promote employment of older persons," 29 U.S.C. § 621(b)—recognizes the unique nature of age as an anti-discrimination classification, and does not, we submit, prohibit employers and unions from negotiating benefits that depend on the employee's attainment of a minimum age or otherwise treat older employees more favorably.

I. COLLECTIVE BARGAINING AGREEMENTS ROUTINELY PROVIDE FOR BENEFITS, THE AVAILABILITY OR TERMS OF WHICH DEPEND ON THE EMPLOYEE'S ATTAINMENT OF A MINIMUM AGE

The facts of this case are not unusual. Whether in the context of provisions intended to ameliorate the impact on employees of a plant shutdown, or in the allocation of retiree health benefits that the employer is willing to provide only for a limited number of years, or in the explicit recognition of the greater needs of older workers, it is not at all remarkable for unions and employers to adopt, through collective bargaining, employee benefit programs that either condition the availability of a benefit on the attainment of a minimum age or vary the terms and amounts of the benefit on that basis. Most such benefit programs would, on the Sixth Circuit's view, be unlawful.

The most ubiquitous such benefit is, of course, a pension plan, which (except in rare cases) establishes a minimum age of eligibility for retirement and provides benefits that increase with the employee's retirement age. While the establishment of a minimum age of eligibility for normal or early retirement in such plans is recognized and expressly permitted by the

ADEA, 29 U.S.C. § 623(*l*)(1)(A),[2] that provision does not specifically address the nearly universal practice of paying benefits that increase with the employee's age at retirement.

Almost equally common—and similarly unprotected by § 623(*l*)(1)(A)—are benefit programs that provide employee benefits other than pensions, most notably health-care benefits. For the same actuarial and practical reasons that guide the design of pension plans, such welfare benefit plans are frequently designed to use a minimum age as an eligibility criterion. For example, it is not unusual for a collective bargaining agreement to provide for retiree health benefits, but only for retirees beyond a certain age.[3]

A union and an employer might negotiate a minimum age requirement for retiree health coverage for either of at least two reasons. First, the employer might be willing to commit only limited resources to such a benefit, and the minimum age of eligibility permits the parties to target whatever benefits the employer is willing to fund to those retirees who

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[2] Section 623(*l*)(1)(A) provides that it is not a violation of the ADEA for "an employee pension benefit plan . . . [to] provide[ ] for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits."

[3] Such retiree health coverage also frequently converts to less valuable and less costly coverage or terminates altogether at the age of eligibility for Medicare benefits. This use of a cut-off age permits the employer to allocate whatever funds it can provide for retiree health care to those retirees who have no other source of health insurance, without committing to lifetime coverage. While one recent court decision has held such a cut-off age unlawful under the ADEA to the extent the employer-provided benefits exceed those available under Medicare, *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), the Equal Employment Opportunity Commission is currently preparing, pursuant to its authority under 29 U.S.C. § 628, a regulation that would exempt from ADEA's prohibitions "the practice of altering, reducing, or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or comparable State retiree health benefits." 68 Fed. Reg. 31116 (May 27, 2003).

need them most. It is not unreasonable to assume that older retirees will have a greater need for such benefits, both because it will be more difficult or expensive for them to obtain coverage from another source, and because their health-care needs will—at least on an actuarial basis—be greater. Second, employers may wish to limit the availability of the retiree health benefit to retirees beyond a certain age as a means of encouraging their employees to remain at work even after having reached the minimum age necessary for retirement.

Another common situation in which a union and an employer will negotiate a benefit that is restricted to employees who have attained some minimum age arises when the employer orders mass layoffs because of "downsizing," a plant closing, or—in the public sector—privatization of bargaining unit work. In such situations, the employer is required to bargain with the union at least over the effects of its decision, and it is not uncommon for such "effects bargaining" to result in an agreement that provides severance pay or some other benefit to employees who lose their jobs. If the employer is unable or unwilling to provide a satisfactory level of benefits for all laid-off or terminated employees, the union and employer may, quite reasonably, agree to target the benefits to those who are likely to experience the greatest difficulty in finding new employment—the older employees.

A similar, albeit less extreme, situation arises when an employer's altered economic or competitive circumstances (whether real or feigned) cause it to insist on eliminating or reducing benefits provided under a collective bargaining agreement—often as an alternative to a threatened plant closing or layoffs. That appears to be what occurred in this case, where a new collective bargaining agreement's elimination of previously provided retiree health benefits was mitigated by a type of "grandfather" provision, under which

employees over 50 years of age as of the date of the new agreement would still be eligible for such benefits. *See* Pet. App. at 3a. The opinion of the court below does not explain the parties' reasoning in adopting that provision, but the rationale seems both evident and eminently reasonable: excluding the oldest employees from the impact of the elimination of the retiree health benefits shielded those who had built up the greatest expectations of entitlement to such benefits upon retirement and who, being closest to retirement, had the least opportunity to make alternative arrangements for health care after their retirement.

Other concessionary negotiations, rather than resulting in retention of the benefit only for a group of "grandfathered" employees, as in this case, might yield agreements that leave the benefit in place prospectively while imposing a new (or higher) minimum age of eligibility.[4]

In none of these cases do the preferences given to older employees reflect decisions made "on the basis of inaccurate and stigmatizing stereotypes," which prompted Congress to enact the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604,

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[4] None of these scenarios that result in greater benefits for older employees should be surprising. It is, in point of fact, the rule and not the exception that collective bargaining agreements do not apportion whatever the union is able to obtain from the employer—in terms of pay, choice of assignments, protection from layoff, and so on—on the basis of strict equality among all members of the bargaining unit. Rather, such benefits are divided unequally on the basis of what is one of the fundamental principles of collective bargaining—and indeed is adhered to by many employers even in a nonunion setting—namely, the rule of seniority. Notwithstanding that the use of seniority can have much the same effect as advantaging older workers on the basis of their age, this Court has upheld the allocation of benefits based on seniority, *see Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), and the ADEA specifically exempts "bona fide seniority system[s]" from its prohibitions. 29 U.S.C. § 623(f)(2)(A).

610 (1993).[5] They are based rather on actuarial realities and on specific, objectively recognizable problems confronted by older employees, including precisely the problem recognized by the ADEA—which the statute has not wholly eradicated—of the greater difficulties faced by older persons in finding new employment once displaced from the workforce. *See* 29 U.S.C. § 621(a)(1).

And it hardly need be pointed out that notwithstanding the use by the courts below of the term "reverse discrimination," there is no issue in this case or in any of the scenarios outlined above of any kind of "affirmative action." That is, to the extent certain fringe benefits are made available on a preferential basis to older employees, such preferences have nothing to do with any attempt to correct a perceived under-representation of older employees in the workforce.

Rather, the reasons for such preferences have to do with the realities of age, a subject to which we now turn.

II. AGE IS DIFFERENT FROM OTHER ANTI-DISCRIMINATION CLASSIFICATIONS IN WAYS THAT ARE DIRECTLY RELEVANT TO EMPLOYEE BENEFITS

A. While it is difficult to imagine that Congress ever would sanction a differentiation in employee benefits based on race, gender, or religion, that is not so for age. Age differs from other prohibited grounds of discrimination in ways that explain why Congress did not intend for the prohibition against discrimination on the basis of age to exclude more generous treatment of older employees in the allocation of employee benefits—such as retirement and early retirement benefits, retiree health care, severance benefits, and the like –

[5] And that includes "benevolent" stereotypes, such as the gender stereotypes that in an earlier era resulted in differential application of workplace protection standards to men and women. *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908).

that relate to the employee's preparation for and dealing with the consequences of advancing age.

The first—and most obvious—difference is that age is not, like race or gender, immutable (or nearly so); nor is it even, like religion, a classification that is rarely changed even though it is possible to do so. One's age is not only subject to change, but this change is inexorable. As the Court has put it, "all persons, if they live out their normal life spans, will experience [old age]." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

A second difference is the objective fact that old age brings with it greater needs and greater costs.[6] With regard to health care, older persons typically have greater needs than younger persons. As a result, if they are not covered by an employer's health-care program, they must often pay more than would a younger person for the same health insurance. With old age, moreover, employment usually comes to an end, resulting in the need for an alternative source of income. And, if an older person's unemployment is involuntary rather than pursuant to a planned retirement, still-existing age discrimination is likely to make finding another job more difficult.

It bears pointing out that, with advancing age, the closer the employee is to the time when he or she will need the age-related employee benefits at issue here—and the less flexibility he or she will have in making other arrangements in the case of unforeseen employment changes.

All of these factors are unique, or nearly so, to age as an anti-discrimination classification. They point up why one cannot simply assume that, in enacting the ADEA, Congress

[6] The ADEA, in 29 U.S.C. § 623(f)(2)(B)(i), specifically recognizes that the cost of providing a given benefit will often be greater for older than younger persons. It allows an employer to provide a lesser benefit to older than to younger employees if the employer incurs at least the same cost in providing the benefit to the older employees.

intended to apply principles gleaned from the context of race or gender discrimination to the question of whether the differential provision of employee benefits targeted at addressing the consequences of old age constitutes "discrimination" on the basis of age.

Thus, while a cost-based justification for race or gender discrimination is inconceivable, the ADEA specifically permits the differential provision of benefits to older and younger workers based on cost. *See* 29 U.S.C. § 623(f)(2)(B)(i).

Or, to take another example, while some cases hold to the contrary, the principles discussed above suggest that a voluntary early retirement incentive plan—which typically provides age-based cash incentives in order to encourage employees to retire before attaining their normal retirement age—should not be evaluated in the same way as a hypothetical plan that provided race- or gender-based incentives in order to encourage members of a particular race or gender to retire from the workforce. *See* Michael J. Van Sistine & Bruce Meredith, *The Legality of Early Retirement Incentive Plans*, 84 Marq. L. Rev. 587 (2001).

In sum, principles gleaned from the context of race or gender discrimination cannot be applied without further analysis to the question of whether employee benefits targeted at addressing the consequences of old age—perhaps on a differential basis—constitute "discrimination" on the basis of age.

B. Not only is age unique as an anti-discrimination classification, but the law expressly recognizes the particular needs of older employees and the legitimacy, in certain contexts, of differential treatment based on age. Many legal rules allow, or even require, preferential treatment with respect to certain kinds of employee benefits for employees who have attained some minimum age. Thus, for example, the Internal Revenue Code penalizes distributions from a qualified retirement plan

if they are made to an employee who is younger than age 59½, or to a former employee who separates from service before attaining age 55. 26 U.S.C. § 72(t)(2)(A)(i), (v). A qualified defined contribution pension plan containing a qualified cash or deferred arrangement may not permit distributions to an employee who has not attained age 59½. 26 U.S.C. § 401(k)(2)(B)(i)(III). A qualified employee stock ownership plan must allow participants who have completed 10 years of service to invest a specified portion of their plan accounts in diversified investments other than employer securities if—but only if—the participant is age 55 or older. 26 U.S.C. § 401(a)(28). Qualified defined benefit retirement plans may distribute greater maximum annual benefits to older participants than to younger participants. 26 U.S.C. § 415(b)(2)(C), (D).

In each of these examples, the tax laws mandate employee benefit plan designs that favor older workers over younger workers, even though the younger workers may have attained the age of 40. They do so because of certain inescapable facts about older employees: they are closer to the point in life at which they will need to draw on these benefits; they typically will have greater health-care and other needs; and they are less likely to be in a position to adapt to changed circumstances with respect to their employment, benefits, or investments.

Indeed, the factual differences between younger and older persons are so evident that society has never considered it to be illegitimate "age discrimination" to provide a variety of preferences for persons beyond a certain age—ranging from "senior" rates for movie tickets to eligibility for membership in the AARP.[7]

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[7] Membership in the AARP—doubtless the nation's foremost defender of the ADEA and of the principles on which it is based—is open only to persons who have attained the minimum age of 50. *See* <http://www.aarp.org/leadership/Articles/a2003-01-13-aarphistory.html>.

Age is, in sum, different from other characteristics on which our nation's anti-discrimination laws are based, and it is different precisely in ways that relate to employee benefits that are provided in connection with or in anticipation of old age. As we next show, the ADEA recognizes this difference, and cannot be read to prohibit collectively bargained employee benefits that are conditioned on the attainment of a minimum age or that otherwise provide more generous treatment for older workers.

III. THE ADEA DOES NOT PROHIBIT EMPLOYEE BENEFIT PLANS IN WHICH THE AVAILABILITY OR TERMS OF A BENEFIT DEPEND ON THE EMPLOYEE'S ATTAINMENT OF A MINIMUM AGE

The ADEA is a complex statute, and it is not our intent to duplicate the detailed statutory construction that will be presented by petitioner and other *amici*. Nonetheless, we address briefly several points in order to demonstrate that Congress could not have intended to prohibit, as invidious discrimination, the kind of collectively bargained employee benefit provision that is at issue in this case – one in which employer and union target scarce resources in an attempt to meet the needs of older workers, for whose benefit the ADEA was enacted.

A. There is good reason to believe that Congress, in enacting the ADEA's prohibition on discrimination on the basis of "age," used that term—as it is not infrequently used—to mean "old age." Had Congress meant to enact a sweeping prohibition against treating anyone differently because that person was of a *different* age—whether older or younger—than someone else, it is difficult to imagine why Congress would have limited the ADEA's protection to persons age 40 and older. *See* 29 U.S.C. § 631(a). The

establishment of a protected class of older persons strongly suggests that what Congress meant to prohibit was discrimination against older persons in favor of younger persons.

This conclusion gains support from the statute's numerous references to the protection of "older workers" or "older persons." Thus, the ADEA's statement of congressional findings, 29 U.S.C. § 621(a), notes that "older workers" are disadvantaged in seeking and retaining employment, that otherwise desirable employment practices may work to the disadvantage of "older persons," and that the incidence of unemployment is high among "older workers." Against this background, Congress declared that the purpose of the ADEA was "to promote employment of *older persons*." 29 U.S.C. § 621(b) (emphasis added). And in its next section, the ADEA directs the Secretary of Labor to undertake a program of education and research "concerning the needs and abilities of *older workers*." 29 U.S.C. § 622(a) (emphasis added).

When Congress amended the ADEA in 1990 to overrule this Court's decision in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), it called the amendatory statute the "*Older Workers* Benefit Protection Act." Pub. L. 101-433, 104 Stat. 978 (emphasis added). And § 101 of that Act reiterated that Congress' purpose in enacting the ADEA had been "to prohibit discrimination *against older workers* in all employee benefits . . . ." *Id.* (emphasis added).

Such statutory language is inexplicable unless what Congress meant to prohibit, in banning discrimination on the basis of "age," was discrimination against *older* employees in favor of *younger* employees.

B. There are two ADEA provisions that can be read as providing limited safe harbors for treating older employees more favorably than younger employees. Thus, § 623(f)(2)(A) protects the observance of "bona fide seniority system[s]"—which generally inure to the benefit of older

employees. And, as noted above, § 623(*l*)(1)(A) sanctions the use of a minimum age of eligibility for normal or early retirement benefits. While it could be argued that these provisions would be superfluous if the ADEA did not, at least in some circumstances, prohibit discrimination in favor of older employees, a more likely explanation is that these two provisions were "technically unnecessary, and were inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*)." *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990).

That the ADEA is such a "belt and suspenders" statute is apparent from other provisions as well. For example, § 623(f)(3) provides that it shall not be unlawful to discharge or discipline an employee "for good cause." But any incident of discharge or discipline that was motivated by "good cause" obviously would not have been motivated by the employee's age, thus making it nonactionable under the ADEA even in the absence of § 623(f)(3). The explanation is, no doubt, that this provision was inserted out of an abundance of caution, and the same is doubtless true of §§ 623(f)(2)(A) and 623(*l*)(1)(A).[8]

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[8] There is also a more specific explanation for the presence in the statute of § 623(f)(2)(A). Both the Internal Revenue Code and the Employee Retirement Income Security Act contain express provisions permitting pension plans to designate a normal retirement age when benefits become payable and must vest. *See* 26 U.S.C. § 411(a)(8); 29 U.S.C. § 1002(24). Section 623(*l*)(1)(A) is probably best viewed as an attempt to ensure that the ADEA contained a parallel provision on this subject to those of the IRC and ERISA. The same concern of maintaining parallelism among the three statutes can be seen in other provisions as well. *See, e.g.*, 29 U.S.C. § 623(i)(1)(plans may not permit the cessation of benefit accruals, the reduction of the rate of benefit accrual, or the cessation or reduction of allocations to an employee's account based on age); 26 U.S.C. §§ 411(b)(1)(G), (H) and 411(b)(2) (same); 29 U.S.C. §§ 1054(b)(1)(G), (H) and 1054(b)(2) (same).

C. While the foregoing establishes that the ADEA was not intended to prohibit preferential treatment of older employees generally, it is particularly clear that Congress intended to allow for the provision of *employee benefits* on terms more favorable to older than younger employees. In § 623(f)(2)(B)(i) the ADEA expressly provides that it shall be lawful for employers and unions "to observe the terms of a bona fide employee benefit plan"—which the retiree health plan at issue in this case indisputably is—"where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker . . . ."

That proviso clearly permits the provision of *greater* benefits for older than younger workers. In the instant case, for example, the "payment made or cost incurred" on behalf of the younger workers who constitute the plaintiff class—employees younger than age 50 on July 1, 1997—is zero. Necessarily, therefore, the "payment made or cost incurred" on behalf of the older workers who remained eligible for the retiree health benefit at issue could be "no less than" the zero cost incurred on behalf of the younger employees. In this situation, as in the similar circumstances discussed in Part I above, § 623(f)(2)(B)(i) clearly expresses Congress' intent to make it lawful for employers to observe the terms of employee benefit plans that provide a more generous benefit to older employees.

D. It seems clear, therefore, that the Sixth Circuit's interpretation of the ADEA to support a claim of discrimination against younger employees—particularly with respect to the allocation of employee benefits that are designed to address the consequences of advancing age—cannot be sustained by any reasonable reading of the statutory language. Even if the import of the statutory language were less clear than we believe it to be, moreover, the Sixth Circuit's ultra-literal reading of that language still could not be sustained.

As Judge Posner has recently observed, "[p]erverse and absurd statutory interpretations are not to be adopted in the name of literalism; they merely show the limitations of literalism as a mode of interpretation." *Twisdale v. Snow*, 325 F.3d 950, 953 (7th Cir. 2003). The Sixth Circuit's perverse interpretation of the ADEA to render unlawful employee benefit plans that, like the one at issue in this case, are intended to address the very problems of older employees that prompted enactment of the statute is a prime example of such misplaced literalism. That reading of the statute is not faithful to the intent of Congress and must be rejected.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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